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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

DEMONTE THOMAS,

Defendant and Appellant.

B287376

(Los Angeles County
Super. Ct. No. MA066546)

APPEAL from a judgment of the Superior Court of Los Angeles County, Daviann L. Mitchell, Judge. Affirmed.

Benjamin Owens, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle and Rene Judkiewicz, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury convicted defendant and appellant Demonte Thomas of first degree murder (Pen. Code, § 187, subd. (a)¹) and found that he personally and intentionally discharged a firearm causing great bodily injury and death (§ 12022.53, subd. (d)). The trial court sentenced defendant to 50 years to life in state prison. On appeal, defendant contends that his lawyer provided ineffective assistance of counsel by failing to request the trial court instruct the jury on provocation with CALCRIM No. 522. We affirm.

II. BACKGROUND

A. *The Prosecution's Evidence*

Michael Davis, Chrystal Monterde, and their one-year-old son lived in an apartment complex in Lancaster. They had a pet miniature poodle.

At around 7:00 p.m. on June 26, 2015, Davis drove a go-cart in the area around the apartment complex. Davis had his dog with him. Monterde was hanging out in the complex's parking lot. Her cousin, Stacy Samuel, who also lived in the complex, was present.

Shortly after 7:00 p.m., Davis ran to Monterde. He was carrying their dog and said it had been hit. The dog's leg was broken and it had a large knot on its stomach. Monterde took the dog from Davis, and Davis drove off in his car. Samuel, "J.B.," and another person followed in J.B.'s car.

¹ All further statutory citations are to the Penal Code.

Davis chased down defendant's truck. They stopped on Seventh Street. Davis and defendant had a conversation. Samuel could not hear what they were saying. Defendant drove away, and Davis ran to his car and tried to stop defendant by cutting off defendant's car. Davis demanded that defendant pay for the dog.

Defendant sped away. Davis, followed by J.B., pursued defendant, but lost him. J.B. and Davis pulled into a Walmart parking lot. Samuel told Davis, "Let's just go back home. Leave it alone."

Davis and Samuel returned to the apartment complex. Davis and Monterde took their dog to a veterinarian. The veterinarian said the dog needed surgery which would cost \$3,000. There would be additional costs for x-rays and medicine.

At approximately 10:00 p.m., Davis and Monterde returned home from the veterinarian. Samuel saw them and ran outside to check on their dog. As Samuel spoke with Davis and Monterde in the parking lot, defendant and four men approached on foot from the street. Defendant and his companions were dressed in all black. Defendant was wearing a "hoody."

Defendant said to Samuel, "I know you from somewhere." Samuel responded, "I know you too." Davis asked, "Are these the people that ran over my dog?" Defendant responded, "Yes. It was me. I did it. I did it on purpose too."

Davis and defendant "exchang[ed] words." According to Monterde, Davis was a little upset and a little frustrated and his voice was a little loud. Davis did not ask defendant for \$3,000, but did tell defendant he wanted defendant to help pay the veterinary bills. Defendant replied, "I told you I ain't have the money for the dog." Angry, Davis yelled, "You gotta to pay for my

dog. I bought that dog for my son.” As Davis spoke to defendant, defendant remained calm and acted “as if it was a joke to him. He didn’t take it serious.”

Monterde told Davis to calm down, and he did. She then spoke to defendant. Monterde said, “The vet said it was going to be \$3,000 for her to have surgery. If you don’t have \$3,000, can you give us \$300 for a replacement dog?” Defendant, who responded calmly and without arguing, said, “I don’t got it. I don’t got it, but I got something for you.”

Then, with a gloved hand, defendant pulled out a gun and shot Davis in the chest. Davis did not have a weapon in either hand. He ran and tried to hide behind a car. Defendant continued to shoot Davis. Davis collapsed and died at the scene. He had sustained 18 gunshot wounds, three of which were fatal.

Samuel and Monterde separately identified defendant from six-pack photographic lineups. They were 100 percent certain about their identifications. A Los Angeles Sheriff’s Department deputy “wrote a warrant” for defendant’s arrest.

On January 3, 2016, defendant was arrested in connection with a traffic stop. Defendant gave the arresting officer a false name. As he was being booked, defendant asked why he was in jail. An officer informed defendant that he had been arrested for murder. Defendant said that he was “tired of running.” The officer asked why defendant had not turned himself in, and defendant responded that he wanted to spend the holiday with his children.

B. *Defendant's Evidence*

Defendant testified on his own behalf. At around 7:30 or 8:00 p.m. on June 26, 2015, defendant drove to the apartment complex where Davis lived. Defendant frequently went to the complex. He did not hit a dog.

Davis approached defendant. They had a conversation about Davis's dog. Defendant denied hitting Davis's dog. They argued for about 20 minutes and Davis asked defendant for \$3,000. Because he was not getting anywhere with Davis, defendant got in his car and tried to leave. One of Davis's friends pulled in front of defendant's car and prevented defendant from leaving.

Davis's friend moved his car, and defendant sped away. Davis chased defendant for about 20 miles before defendant lost him. Defendant drove home.

Defendant remained at home for about 45 minutes before leaving in a different car to drop off money for his children. Defendant then received a telephone call from his friend "Gutter" who lived in Davis's apartment complex.

Between 9:30 and 10:00 p.m., defendant drove to the apartment complex to pick up money Gutter owed defendant for marijuana defendant sold him. Defendant remained at Gutter's apartment for about 10 to 15 minutes.

After leaving Gutter's apartment, defendant spoke with "Hollywood" near the entrance of the parking complex. Defendant then made his way toward the area where the shooting took place. There, he spoke with "Blue" and "Richie Rich." Although Gutter, Hollywood, Blue, and Richie Rich "were

there that night and saw what happened,” none of them was going to testify.

People were playing dice between two cars. As defendant spoke with two people near the dice game, Davis and Monterde appeared. Defendant did not know that Davis and Monterde lived in the apartment complex. Davis argued with a group of people about a dog being hit.

Davis and Monterde did not notice defendant at first. Then, Samuel, whom defendant knew from the neighborhood, appeared and said either that it was defendant who hit Davis’s dog or that defendant was the person whom they had chased down earlier.

Davis then turned his attention to defendant and argued with him. Davis said that if defendant was the person who hit his dog, he needed \$3,000 to “[fix]” the dog. Defendant denied that he hit Davis’s dog. Because he “didn’t want to deal with this” and was “fed up,” defendant walked away from Davis. Davis did not follow defendant. As defendant was walking away, he heard gunshots.

Defendant could not tell from where the shots were coming. Believing Davis had shot him, defendant fell to the ground. He testified on cross-examination, however, that he did not see a gun in Davis’s hand. He further testified that he did not see anyone with a gun and did not know the shooter’s identity. After falling to the ground, defendant got up, ran to his car, and left.

When defendant saw on the news that he was wanted for murder, he did not surrender himself. He was afraid of being incarcerated for a murder he did not commit. Defendant “had to get [his] family right, take care of [his] situation to come into this situation the best way [he could].” He hired a lawyer.

Deborah Gholston had known defendant, her adopted grandson, for about five years. She had never seen him lose his temper, get angry, or exhibit any kind of violent behavior. Defendant was calm, mild, well-mannered, and very responsible.

Shenae Harris and defendant had “been together” for over 12 years. Defendant was the father of her children. She had never seen him angry, lose his temper, or hurt anyone. He was a good family man, very thoughtful, and funny. He thought before he acted and helped Harris think before she acted. Defendant was a calming influence in her life.

Carol Golightly had known defendant for about 10 years. She had never seen him lose his temper, be angry, or hurt anyone. He was calm, funny, and a great person.

III. DISCUSSION

Defendant contends that defense counsel provided ineffective assistance of counsel by failing to request the trial court instruct the jury on provocation with CALCRIM No. 522. We disagree.

A. *Standard of Review*

“Generally, a conviction will not be reversed based on a claim of ineffective assistance of counsel unless the defendant establishes *both* of the following: (1) that counsel’s representation fell below an objective standard of reasonableness; *and* (2) that there is a reasonable probability that, but for counsel’s unprofessional errors, a determination more favorable to defendant would have resulted. [Citations.]” (*People v. Foster*

(2003) 111 Cal.App.4th 379, 383.) If the defendant fails to show either that defense counsel’s performance was deficient or that he suffered prejudice, the ineffective assistance claim fails. (*Ibid.*)

“A reviewing court will indulge in a presumption that counsel’s performance fell within the wide range of professional competence and that counsel’s actions and inactions can be explained as a matter of sound trial strategy. . . . If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation.” (*People v. Gamache* (2010) 48 Cal.4th 347, 391; *People v. Weaver* (2001) 26 Cal.4th 876, 925 [“Reviewing courts defer to counsel’s reasonable tactical decisions in examining a claim of ineffective assistance of counsel . . .”].)

B. *Analysis*

CALCRIM No. 522,² an instruction that provocation may reduce a murder from first to second degree, is a pinpoint instruction. (*People v. Rogers* (2006) 39 Cal.4th 826, 877-880 [addressing CALJIC No. 8.73].) “A trial court must give a pinpoint instruction, even when requested, only if it is supported

² CALCRIM No. 522 provides, in relevant part:

“Provocation may reduce a murder from first degree to second degree . . . The weight and significance of the provocation, if any, are for you to decide.

“If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder. . . .”

by substantial evidence. [Citation.] The evidentiary premise of a provocation defense is the defendant's emotional reaction to the conduct of another, which emotion may negate a requisite mental state." (*People v. Ward* (2005) 36 Cal.4th 186, 214-215.)

"The test of whether provocation . . . can negate deliberation and premeditation so as to reduce first degree murder to second degree murder . . . is subjective." (*People v. Padilla* (2002) 103 Cal.App.4th 675, 678.) When the record contains no evidence of the defendant's emotional response to the asserted provocation, a trial court does not err in denying a pinpoint instruction on provocation. (*People v. Ward, supra*, 36 Cal.4th at p. 215.)

The trial court instructed the jury that defendant was guilty of murder if he committed an act that caused the death of another and in committing that act, he acted with malice aforethought. It further instructed that defendant was guilty of first degree murder if the prosecution proved he acted willfully, deliberately, and with premeditation. Defendant acted willfully if he intended to kill, deliberately if he decided to kill having carefully weighed the considerations for and against his choice and knowing the consequences, and premeditatedly if he decided to kill before he completed the act that caused the death. "A decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated." If the prosecution failed to prove the killing was first degree murder, then the murder was second degree murder.

Defendant's challenge to defense counsel's failure to request the trial court deliver the pinpoint jury instruction on provocation fails because there is a satisfactory explanation for counsel's inaction—defense counsel may not have requested the

provocation instruction because it was inconsistent with defendant's initial calm reaction to Davis's conduct. (*People v. Ward, supra*, 36 Cal.4th at p. 215.) Monterde testified that when an angry Davis confronted defendant about defendant hitting Davis's dog and demanded that defendant help pay the veterinary bills, defendant remained calm and acted "as if it was a joke to him. He didn't take it serious." When Monterde asked defendant about compensation for hitting the dog, defendant responded calmly and without arguing. He said, "I don't got it. I don't got it, but I got something for you." He then pulled out a gun and shot Davis.

Defendant's account of the shooting also demonstrates that defendant did not act in response to provocation. According to defendant, Davis was arguing with a group of people about Davis's dog when Samuel arrived and told Davis that defendant was the person who hit his dog. Davis then argued with defendant, saying that he needed \$3,000 to fix the dog if defendant hit the dog. Defendant denied hitting Davis's dog and, because defendant "didn't want to deal with this" and was "fed up," he walked away from Davis. As defendant was walking away, he heard gunshots.

Defense counsel also may not have requested the trial court deliver the pinpoint instruction on provocation as a matter of trial tactics. Such an instruction would have conflicted with defendant's sole defense that he was not the shooter. (*People v. Olivas* (2016) 248 Cal.App.4th 758, 770-772 [defense counsel may have had a tactical reason for and did not provide ineffective assistance of counsel by failing to request a pinpoint instruction that was inconsistent with the defendant's primary defense].)

For the provocation instruction to have benefited defendant, the jury would have had to find that he was the shooter.

Finally, even if defense counsel provided ineffective assistance of counsel by failing to request the trial court give the jury the pinpoint instruction on provocation, there was no prejudice because there was overwhelming evidence of defendant's willfulness, deliberation, and premeditation. Defendant went to Davis's apartment complex dressed in all black clothes and armed with a gun. He remained calm throughout his interaction with Davis. He pulled out the gun he used in the murder with a gloved hand and shot Davis at close range, inflicting 18 gunshot wounds. Given such evidence, there was no reasonable probability the jury would have found defendant guilty of second degree murder if defense counsel had requested, and the trial court had delivered, CALCRIM No. 522.

IV. DISPOSITION

The judgment is affirmed.

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KIM, J.

We concur:

MOOR, Acting P. J.

JASKOL, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.